## REMARKS

Claim 29 has been amended to recite that "the droplets have an average diameter of about 70 to about 200 nm." Support for the amendment is found in the specification at, for example, paragraphs 85-90. The published specification, U.S. 2001/0009679, is referenced.

Claim 32 has been cancelled without prejudice.

Claim 36 has been added. Support for claim 36 is found in the specification at, for example, paragraph 8, paragraphs 20-21, paragraph 48, lines 1-7, and paragraph 98; and original claims 1 and 15. *See In re Gardner*, 177 USPQ 396, 397 (CCPA 1973) and MPEP §§ 608.01(o) and (l).

Claim 37 has been added. Support for claim 37 is found in the specification at, for example, paragraph 8, paragraphs 20-21, paragraph 23, lines 14-16, paragraph 40, lines 9-13, paragraph 48, lines 1-12, paragraph 51, lines 4-6, paragraph 52, lines 1-7, and paragraph 98; and original claims 1 and 15. (Id.)

No new matter has been added.

Claims 1, 3-15, 17, 28-31, and 33-37 are currently pending.

***Indefiniteness Rejection***

Claims 1, 3-15, 17 and 28-35 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. (Paper No. 20100201 at 2.)

In making the rejection, the Examiner asserted that the "[i]nstant claims require a matrix consisting of an emulsion forming composition that is indefinite. It is

unclear what the meets and bounds of the said matrix are particularly when the word 'matrix' is followed by the term 'consists of.'" (Id.) The Examiner requested clarification. (Id.)

It is respectfully submitted that the term "matrix" is used as it is generally understood in the art as a substance in which a further substance, in the present case a fat-soluble vitamin, is embedded. As is indicated in the specification in the first paragraph under the heading "Detailed Description of the Invention," i.e., paragraph 20, the vitamin is dispersed in the matrix, as the components of the matrix have an emulsifying capacity. Thus, the resulting droplets within a liquid, when the powder is added to a liquid, is a vitamin core sheathed by the matrix component interface between vitamin and the aqueous medium. In addition, the specification indicates that in preparing the emulsion to produce the claimed powder composition, "[t]he matrix component should ... produce an emulsion that remains stable ...." (Paragraph 30, lines 18-21.) Further information regarding the matrix is provided in the specification at, for example, paragraphs 28-44.

Thus, claim 1 is directed to a powder composition comprising an emulsion-forming composition selected from the group consisting of a natural polysaccharide gum, a mixture of polysaccharide gums, a protein, a mixture of proteins, and mixtures thereof, which composition forms the matrix in which at least one fat-soluble vitamin is dispersed. Thus, in the claimed powder composition the vitamin droplets having an average diameter of about 80 to about 120 nm are sheathed by the matrix component.

It is further noted that with respect to the powder composition of claim 1, the use of the claim term "consisting of" modifies the word "matrix" and has its common patent law accepted meaning with respect the list of emulsion–forming compositions that follow it (i.e., a natural polysaccharide gum, a mixture of polysaccharide gums, a protein, a mixture of proteins, or mixtures thereof).

It is respectfully submitted that the claim language is sufficiently definite and that the rejection has been rendered moot. Reconsideration and withdrawal of the rejection are requested.

***Obviousness Rejections***

A. Claims 1, 3-14, 17, and 28-35 over Auweter in view of Antoshkiw or Auweter and Stein in view of Antoshkiw

Claims 1, 3-14, 17, and 28-35 were rejected under 35 U.S.C. § 103(a) as obvious over either U.S. Patent No. 5,968,251 to Auweter ("Auweter") in view of U.S. Patent No. 3,998,753 to Antoshkiw et al. ("Antoshkiw") or Auweter and EP 937412 to Stein et al. ("Stein") in view of Antoshkiw. (Paper No. 20100201 at 3.)

Auweter and Stein have been summarized on the record.

Antoshkiw discloses "water dispersible carotenoid compositions in liquid or powder form which are suitable for use in the preparation of colored optically clear, stable, aqueous compositions and which can be incorporated into, e.g., pharmaceutical or cosmetic preparations or animal feedstuff and to processes for their preparation." (Abstract.)

In making the rejection, the Examiner made the same assertions regarding Auweter and Stein as in the Final Office Action dated April 1, 2009, Paper

No. 200903330 ("the prior Action"), at 2-4. (Paper No. 20100201 at 3-4.) For a summary of these assertions, see the Submission Under 37 CFR § 1.114 Including Amendment; Response to Final Office Action dated December 2, 2009 ("the prior Submission") at 14-15.

In making the present rejection, the Examiner also asserted the following:

> Antoshkiw [et al.] (cited in the introduction section of EP reference) US Patent 3,998,753 describes a batch process for the preparation of a water dispersible carotenoid containing powder, wherein the carotenoid has a particle size of less than 1 micron, which process comprises (a) forming a solution of a carotenoid and an antioxidant in a volatile solvent, said solvent being selected from the group consisting of halogenated aliphatic hydrocarbons such as chloroform, carbon tetrachloride and methylene chloride; (b) forming an 2o [sic] aqueous solution of sodium lauryl sulfate, a water soluble carrier composition such as e.g. gelatin, a preservative and a stabilizer, and adjusting said solution to a pH of about 10 to 11 and (c) forming an emulsion of the solutions of steps (a) and (b) by mixing at a high speed and high shear; removing the organic solvent and spray drying the resulting emulsion to obtain a carotenoid powder. In col. 2, L 16-24, the above reference teaches high optical clarity of the water dispersible powders of carotenoids and further teaches that high speed emulsification employed in the process involves high shear that is essential for obtaining a small particle size (col. 3, L 33-62). The reference also states that the effective shear force is a function of viscosity, solid content, speed of mixing, geometry of mixer and mixing vessel. Furthermore, the reference teaches in order to keep the particle size below 0.1 microns (<100 nm), one has to employ high shear force and high speed mixing.
>
> Thus, a skilled artisan would have been able to prepare the [desired] particle sizes of carotenoids of Auweter and EP, in particular below 0.1 microns, by optimizing the mixing speed and high shear force such that when dispersed in water the powder results in high optical clarity. Examiner notes that newly added claim 29 recites particle size up to 200 nm, which is taught by Auweter and is within the size range (<400 nm) of EP reference. Thus, applicants have not shown any evidence that one of an ordinary skill in the art would not be able to arrive at the

> claimed particle sizes with the method of Auweter [and/or] EP.
>
> With respect to the newly added claims 29-35, the claims are directed to a product and not a product [sic]. While it is noted that the product claims recite the process limitations, even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself.... The examiner notes that the product of claim 29 is no different from the product of claim 1 and hence the process steps do not determine the patentability of the claims. [Id. at 4-6.]

In the "Response to Arguments" section, the Examiner asserted as follows:

> Applicants argue that Auweter teaches carotenoids that are entirely insoluble in water and discloses "coldwater-dispersible dry powders which contain carotenoids and are obtainable [by the process disclosed] and which have different color effects depending on the production variant" (Col. 1, lines 26-29). It is argued that there is no disclosure in Auweter of any particles size of active substance that does not have at least 200 nm in diameter.... Applicants have not provided any evidence that one of an ordinary skill in the art would not be able to arrive at the claimed sizes (claims 1 and 32) with the methods of Auweter and/or EP.
>
> Applicants argue that the examiner did not provide the reasoning as to why a skilled artisan would arrive at the claimed particle sizes and also why a skilled artisan would modify the teachings of Auweter with that of EP. A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill the art, including nonpreferred embodiments. [citations omitted.] Applicants merely argue without providing any evidence as to why the less than 400 nm of EP reference does not include claimed sizes and why the process of EP does not result in the claimed sizes. In paragraph 0026, EP states that the carotenoids and the matrix are mixed, emulsified by a homogenizer to a particle size of 150-400 nm. Thus, EP is not strictly limited to 400 nm and a skilled artisan would have been to try [sic] to optimize the particle size to a desired particle size lower than 400 nm size. On the other hand, the declarations of Stein and Leuenberger does [sic] not provide any comparative results showing that the [particle] sizes of

less than 400 nm or the claimed sizes are not possible from the disclosures of EP (or Auweter who teaches 200 nm). EP further suggests in [0017] that swellable colloids suitable for matrix include gelatin, gum arabic, milk proteins, and vegetables proteins, a suggestion that one skilled in the art may be able to employ the colloidal materials of EP in Auweter, i.e., gums, starch, gelatine etc., to prepare the dispersible powders of the instant invention.

Furthermore, the newly cited US patent teaches optical clarity and also the high shear forces to optimize the particle size below 100 nm. Accordingly, even though the response and the declarations of Stein and Leuenberger emphasize in great depth on the two features of the invention, optical clarity of the powders when dispersed in water and particle size, the newly added reference teaches both optical clarity and provides the result-effective variables to achieve the desired particle size. Thus, even though the claims are silent with respect to the optical clarity, the prior art does recognize the [argued] limitations and therefore the arguments are not persuasive.

With respect to the new product-by-process claims, the patentability of the process steps in product claims have been explained in the body of the rejection. Additionally, the argument is substantiated by the teachings of the new reference that even though the process steps are different in the prior art Antoshkiw, a skilled artisan would be able to prepare the claimed particle sizes, which in itself is an evidence to the precedent that the patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. [Id. at 7-9.]

It is well settled the Examiner bears the burden to set forth a *prima facie* case of unpatentability. *In re Glaug*, 62 USPQ2d 1151, 1152 (Fed. Cir. 2002); *In re Oetiker*, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992); and *In re Piasecki*, 223 USPQ 785, 788 (Fed. Cir. 1984). If the PTO fails to meet its burden, then the applicant is entitled to a patent. *In re Glaug*, 62 USPQ2d at 1152.

Here, what the rejection should have done, but did not, was to explain on the record ***why*** one skilled in this art would modify the disclosures of Auweter and Antoshkiw or Auweter, Stein, and Antoshkiw in the manner proposed by the Examiner, to arrive at the claimed powder composition. As is well settled, an Examiner cannot establish obviousness by locating documents which describe various aspects of a patent applicant's invention without also providing evidence of the motivating force which would impel one skilled in the art to do what the patent applicant has done. *Takeda Chem. Indus., Ltd v. Alphapharm Pty., Ltd.*, 492 F.3d 1350, 1357 (Fed. Cir. June 28, 2007) (citing *KSR*) (indicating that "it remains necessary to identify ***some reason*** that would have led a chemist to modify a known compound in a particular manner to establish prima facie obviousness of a new claimed compound") (emphasis added); *Ex parte Levengood*, 28 USPQ2d 1300, 1301-02 (BPAI 1993). But this is precisely what the Examiner has done here. Thus, the rejection is legally deficient and should be withdrawn for this reason alone.

Beyond looking at the cited documents to determine if any of them suggests doing what the inventors have done, one must also consider if the art provides the required expectation of succeeding in that endeavor. See *In re Dow Chem. Co. v. American Cyanamid Co.*, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988). "Obviousness does not require absolute predictability, but a reasonable expectation of success is necessary." *In re Clinton*, 188 USPQ 365, 367 (CCPA 1976). Furthermore, the U.S. Patent and Trademark Office Examination Guidelines at page 57527 provide the following guidance to Examiners: "In short, the focus when making a determination of obviousness should be on what a person of ordinary skill in the pertinent art would have

known at the time of the invention, and on what such a person would have reasonably expected to have been able to do in view of that knowledge". However, no such motivation or expectation of success can be found in the cited documents.

Arguments presented on the record in response to the rejections citing Auweter and/or Stein, including the Declaration of Bruno Leuenberger, Ph.D., Under 37 C.F.R. § 1.132 and the Declaration of Mr. Hermann Stein Under 37 C.F.R. § 1.132, are incorporated here as though presented in full.

Antoshkiw does not disclose, suggest, provide motivation for, or provide any expectation of success in the claimed powder composition. For example, Antoshkiw discloses a batch-process for the preparation of a water-dispersible carotenoid-containing powder, wherein the carotenoid has a particle size of less than 0.1 micron, which process comprises the steps of:

> a) forming a solution of a carotenoid and an antioxidant in a volatile organic solvent selected from halogenated aliphatic hydrocarbons, benzene or carbon disulfide;
>
> b) forming an aqueous solution of sodium lauryl sulfate (SLS), a water-soluble carrier composition, a preservative and a stabilizer, and adjusting said solution to a pH of about 10 to 11; and
>
> c) forming an emulsion of the solution of steps a) and b) using both mixing and a high speed and high shear; removing the organic solvent and spray-drying of the resulting emulsion to obtain the water-dispersible carotenoid-containing powder. (Col. 4, lines 25-57.)

Antoshkiw discloses that "***[t]he combination of both the modified emulsification technique and the use of controlled pH in conjunction with the***

***sodium lauryl sulfate*** ***emulsifier results in a significant decrease in the particle size of the carotenoid*** in the dispersed oil-phase of the emulsion to be below 0.1 micron and a particle size range of less than 0.1 micron for the carotenoid in the resulting dried carotenoid-containing powder compositions. This carotenoid particle size is the major factor in obtaining the optical clear, aqueous compositions...." (Col. 3, line 63 to Col. 4, line 4) (emphasis added.) Therefore, Antoshkiw discloses that a significant reduction in the particle size to below 0.1 micron is attributed to Antoshiw's use of a modified emulsification technique in combination with the use of the known emulsifier sodium lauryl sulfate ("SLS"). Antoshiw thus discloses that ***SLS is necessary in Antoshkiw's emulsion to achieve the low particle size indicated***.

As one skilled in the art is aware, SLS is a very hydrophilic detergent surfactant. From the disclosure of Antoshkiw, one skilled in the art would understand that a very hydrophilic detergent surfactant would likely be needed as an emulsifier. The presently claimed particle sizes are not obtained by the use of a detergent surfactant such as SLS, as disclosed by Antoshkiw. Nor are the droplets of the claimed powder composition obtained from an emulsion in which a detergent surfactant such as SLS is the emulsifier responsible for the claimed particle size. Contrary thereto, in the disclosed and claimed powder composition of the present application, the solid droplets having an average diameter of about 80 to about 120 nm are dispersed in the matrix consisting of an emulsion-forming composition selected from the group consisting of a natural polysaccharide gum, a mixture of polysaccharide gums, a protein, a mixture of proteins, and mixtures thereof. Emulsification using the emulsion-forming composition is used to achieve the claimed powder composition comprising the recited matrix (which

consists of the emulsion-forming composition). *See, e.g.,* the disclosure regarding emulsification in the present application at, for example, paragraphs 28-51 and paragraphs 85 to paragraph 95, line 5, and paragraphs 97-107.

Given what one of skill in the art would understand as the unpredictable nature of emulsions as well as Antoshkiw's indication to use a very hydrophilic detergent surfactant, one could not have predicted that macromolecular stabilizers selected from the group consisting of polysaccharide gums, a protein, a mixture of proteins, and mixtures thereof would not only be emulsion-forming for the fat-soluble vitamin, but also provide a matrix in which the fat-soluble vitamin is dispersed as solid droplets having an average diameter of about 80 to about 120 nm in the claimed powder composition. Antoshkiw's disclosed SLS-containing emulsion in no way suggests, provides motivation for, or an expectation of success in the claimed powder composition in which the recited particle sizes are achieved as dispersed droplets in the matrix (which consists of the emulsion-forming composition), as claimed.

Moreover, the fact that Antoshkiw requires that SLS be present in order to obtain particle sizes below 0.1 micron leads one skilled in the art away from the claimed powder composition, wherein instead of the very hydrophilic detergent surfactant SLS, an emulsion-forming composition selected from the macromolecular stabilizers consisting of a natural polysaccharide gum, a mixture of polysaccharide gums, a protein, a mixture of proteins or mixtures thereof are the required emulsifying agent(s) as well as the matrix component(s).

To modify Antoshkiw in a manner that changes the type of emulsifier as indicated would be to alter the Antoshkiw process/composition in a manner not

intended and, in fact, contrary to its teaching. But, as is well settled, to do what the prior art teaches against is the very antithesis of obviousness. *See, e.g., In re Rosenberger*, 156 USPQ 24, 26 (CCPA 1975). For this reason alone, the rejection should be withdrawn.

Furthermore, Antoshkiw discloses the use of high amounts of SLS. For instance, in Example 2, SLS is present in amounts that are about 47% or about 43 % of the amount of carotenoid present. These amounts of SLS are neither desirable nor justifiable for use in foods or beverages. And, one would consider that the use of a relatively large amount of a strong hydrophilic detergent surfactant, SLS, would further counsel against replacement of the SLS as suggested by the Examiner.

In obtaining the claimed fat-soluble vitamin droplets dispersed in a matrix consisting of an emulsion-forming composition of a natural polysaccharide gum, a mixture of polysaccharide gums, a protein, a mixture of proteins, or mixtures thereof, no emulsifier other than the emulsion-forming composition as recited could be present in emulsifying quantities, as this would essentially replace the natural polysaccharide, the proteins or mixtures thereof as the emulsifier. One skilled in the art would consider that a very hydrophilic detergent surfactant such as SLS could be destabilizing to a matrix as claimed. As such, the claimed matrix in which the fat-soluble vitamin is dispersed would not have been considered by one skilled in the art to be a substitute for a very hydrophilic detergent surfactant such as SLS, as in Antoshkiw. Moreover, one skilled in the art would not have predicted success in the claimed powder compositions using the recited matrix component.

In this regard, new claims 36 and 37 are pointed out to the Examiner. Claims 36 and 37 recite that the powder composition "[consists] of" and "[consists] essentially of", respectively, at least one fat-soluble vitamin dispersed in a matrix consisting of an emulsion-forming composition, as claimed. A destabilizing, very hydrophilic detergent surfactant would not be included as a component of the claimed powder compositions.

Returning to the rejection, the Examiner's assertion that because Antoshkiw "teaches high optical clarity of the water dispersible powders of carotenoids and further teaches that high speed emulsification employed in the process involves high shear that is essential for obtaining a small particle size[,] ....a skilled artisan would have been able to prepare the [desired] particle sizes of carotenoids of Auweter and EP, in particular below 0.1 microns, by optimizing the mixing speed and high shear force such that when dispersed in water the powder results in high optical clarity" (paper no. 20100201 at 4-5) is in error because it ignores the teachings of Antoshkiw as a whole and renders an impermissible hindsight conclusion. As indicated above, Antoshkiw achieves the particle size disclosed by use of the required very hydrophilic detergent surfactant, SLS, which does not suggest and, indeed, leads one skilled in the art away from use of the claimed matrix component.

Furthermore, the Examiner has chosen to point out the use of shear force and high speed mixing in Antoshkiw as a reason to conclude that the claimed invention is obvious. Antoshkiw, however, does not disclose the process of the present invention including, *inter alia*, the use of the claimed matrix component and the use of high pressure. As disclosed and claimed, the present invention involves emulsifying within a

given range of temperature and pressure. *See*, e.g., claims 29, 33 and 34. As argued previously on the record, the art provides no expectation of success in using the claimed pressure. See the prior Submission at 23-25. Also with reference to the art, Dr. Leuenberger stated in his Declaration that particle diameter has no consistent relation to pressure. (Leuenberger Decl. ¶ 29.) This is unrebutted testimony from a person that is at least of ordinary skill in the art. The Examiner cannot assert that a process parameter of Antoshkiw would render the claimed powder composition obvious while ignoring other aspects that are not disclosed or suggested by Antoshkiw, e.g., the high pressure parameter, and the requirement in Antoshkiw of an ingredient that is disclosed as essential to achieving the disclosed particle size, e.g., the use of SLS, which would not be considered a substitute for the matrix component in the claimed powder composition. Antoshkiw does not suggest the use of the claimed matrix component and, even if one were to consider the use of the claimed matrix component in view of Antoshkiw (which is contested), there is no guidance provided regarding process parameters that may be useful in achieving the claimed powder composition. One skilled in the art could not have predicted success in achieving the claimed powder composition.

It is noted that the Examiner's arguments regarding Antoshkiw are lacking not only with regard to "new product by process claims", as referenced by the Examiner in the prior Action (Id. at 8), e.g. claim 29, but also with regard to the product claims, e.g., claims 1, 36 and 37, which recite "at least one fat-soluble vitamin dispersed in a matrix consisting of an emulsion-forming composition selected from the group consisting of a natural polysaccharide gum, a mixture of polysaccharide gums, a

protein, a mixture of proteins, and mixtures thereof, wherein the fat-soluble vitamin is present in the powder composition in the form of solid droplets having an average diameter of about 80 to about 120 nm." Not only does Antoshkiw not disclose the recited matrix, but there would have been no expectation of success in the claimed powder compositions using the recited matrix component in view of Antoshkiw.

Antoshkiw, whether alone or in combination with Auweter or with Auweter and Stein, does not disclose, suggest, provide motivation for, or provide any expectation of success in the claimed powder composition in which at least one fat-soluble vitamin is dispersed in a matrix consisting of an emulsion-forming composition selected from the group consisting of a natural polysaccharide gum, a mixture of polysaccharide gums, a protein, a mixture of proteins, and mixtures thereof, wherein the fat-soluble vitamin is present in the powder composition in the form of solid droplets having an average diameter of about 80 to about 120 nm. The deficiencies of Auweter or of Auweter and Stein have not been remedied by the Examiner's citation of Antoshkiw.

It is also submitted that the Examiner is applying an improper and overly stringent standard in evaluating the claims under § 103. The Examiner asserted that "the declarations of Stein and Leuenberger does [sic] not provide any comparative results showing that the [particle] sizes of less than 400 nm or the claimed sizes are not possible from the disclosures of EP (or Auweter who teaches 200 nm.)" (Id.) There is no requirement in law that applicants prove that the claimed particle sizes are not possible from any of the cited documents. As was argued in the prior Submission and consistent with Dr. Leuenberger's opinion, one skilled in the art could not have

predicted from Auweter alone or in view of Stein that the claimed powder composition could be produced having a fat-soluble vitamin in the form of solid droplets having an average diameter of about 80 to about 120 nm, and which achieves optical clarity and a transparent and/or translucent solution upon addition to a clear liquid. See the prior Submission at 26-27; the Leuenberger Decl. ¶ 33.) This expert testimony too stands unrebutted. In addition, in view of the foregoing arguments, Antoshkiw provides no suggestion, motivation or expectation of success in the claimed powder composition in which at least one fat-soluble vitamin is dispersed in a matrix consisting of an emulsion-forming composition selected from the group consisting of a natural polysaccharide gum, a mixture of polysaccharide gums, a protein, a mixture of proteins, and mixtures thereof, wherein the fat-soluble vitamin is present in the powder composition in the form of solid droplets having an average diameter of about 80 to about 120 nm. Under the proper standard, it is submitted that the rejection cannot stand.

As has been indicated on the record, hindsight claims of obviousness such as constitute the present rejection are improper. *Procter & Gamble Co. v. Teva Pharmaceuticals USA, Inc.*, 566 F.3d 989, 997 (Fed. Cir. 2009). In distinguishing between fact patterns where a combination of known elements may or may not be proper, the Federal Circuit clearly articulated that simply varying all possible parameters until the claimed invention is arrived at in the absence of either an indication of which parameters to vary or an indication of which of many possible choices is likely to be successful is impermissible hindsight reconstruction.

Consistent with arguments presented and Dr. Leuenberger's opinion, achieving a successful powder composition as presently claimed that has the inherent

advantages of optical clarity and a transparent and/or translucent solution upon addition to a clear liquid could not have been predicted by one of skill in the art. Here, known options for preparing a powder composition as indicated by Auweter in view of Antoshkiw or Auweter and Stein in view of Antoshkiw, were not "finite, identified, and predictable", as in the facts presented in *KSR Int. Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007). In *Abbott Labs. v. Sandoz, Inc.*, 89 USPQ 1161, 1171 (Fed. Cir. 2008), the Court of Appeals for the Federal Circuit indicated that the Supreme Court in *KSR* "did not create a presumption that all experimentation in fields where there is already a background of useful knowledge is 'obvious to try,' without considering the nature of the science or technology."

Moreover, as in the *Abbott* case, one skilled in the art would not have anticipated success in achieving the presently claimed powder composition, as "knowledge of the goal does not render its achievement obvious." *Abbott Labs. v. Sandoz, Inc.*, 89 USPQ at 1172 (affirming the district court's determination that Abbott is likely to prevail in its claim that the patent is valid, and upholding the grant of a preliminary injunction).

Clearly, the Examiner's rejection over Auweter in view of Antoshkiw or over Auweter and Stein in view of Antoshkiw is based on impermissible hindsight reconstruction and is improper. Moreover, any modification of the cited documents can not lead to the present claims.

It is submitted that the rejection has been rendered moot. Reconsideration and withdrawal of the rejection are requested.

B. Claim 15 over Auweter in view of Antoshkiw or Auweter and Stein in view of Antoshkiw, and further in view of Emodi

Claim 15 was rejected as obvious over Auweter in view of Antoshkiw or Auweter and Stein in view of Antoshkiw as applied to claims 1, 3-14, 17 and 28-35 above, and further in view of Emodi. (Paper No. 20100201 at 6.)

Auweter and Stein have been summarized on the record.

Antoshkiw is summarized in section A above.

In making the rejection, the Examiner made the same assertions as on page 4 of the prior Action. (Paper No. 20100201 at 6.) For a summary of these assertions, see the prior Submission at 30-31.

In the present rejection, the Examiner has not included any assertions regarding Antoshkiw. For this reason alone, the rejection should be withdrawn. To forward prosecution in the present application, however, the present response is provided to the rejection.

In the "Response to Arguments" section, the Examiner asserted:

> Applicants argue that the arguments presented for the teachings of Auweter and EP apply to claim 15 and that Emodi does not overcome the deficiencies of the above references. However, the new rejection addresses the limitations of particle sizes and the unclaimed limitation of optical clarity. Emodi has been cited for moisture content. Thus, the examiner has established a prima facie obviousness for the claimed invention. [Id. at 9.]

Arguments presented on the record in reply to the rejection over Auweter, Stein, and Emodi are incorporated here as though presented in full.

Arguments presented in section A above in response to a rejection over Auweter in view of Antoshkiw or Auweter and Stein in view of Antoshkiw are also incorporated here as though presented in full.

The rejection should be removed in view of the above-noted incorporated arguments.

Furthermore, it is submitted that Antoshkiw does not cure the deficiencies of Auweter or Auweter and Stein, each in view of Emodi. There is no disclosure or suggestion in Antoshkiw that would disclose or suggest the presence of from about 1 to about 4 % by weight water in connection with the powder composition of claim 15.

In view of all of the foregoing, the rejection has been rendered moot. Reconsideration and withdrawal of the rejection are requested.

***Double Patenting***

The Examiner asserted that "[i]n their response dated 12-7-09, applicants agreed to file a terminal disclaimer upon indicating allowable subject matter. However, at this time no allowable subject matter is indicated. Therefore, the rejection is maintained." (Paper No. 20100201 at 9.)

As previously stated, upon indication of allowable subject matter, a Terminal Disclaimer will be submitted.

For the reasons set forth above, entry of the amendments, withdrawal of the rejections, and allowance of the claims are respectfully requested. If the Examiner has any questions regarding this paper, please contact the undersigned.

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on August 4, 2010.

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